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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 172

FEDERAL POWER COMMISSION, *Petitioner*

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on April 4, 1952.

OPINION BELOW

The opinion of the Court of Appeals (R. 1571-1587) is reported at 195 F. 2d 872.

JURISDICTION

The judgments of the Court of Appeals were entered on April 4, 1952 (R. 1587-1593). The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether an applicant for a certificate of public convenience and necessity to authorize the construction and operation of a natural gas pipeline system is entitled to a hearing as a matter of right under Section 7(c) of the Natural Gas Act on an application filed after the Federal Power Commission has held extensive hearings and rendered a decision in consolidated proceedings on prior applications of both the applicant and a competitor which, taken together, sought authority to serve the same markets as the later application.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83, 15 U.S.C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 25-31.

STATEMENT

This case involves several orders of the Federal Power Commission entered upon competitive applications for certificates of public convenience and necessity filed by Northeastern Gas Transmission Company (Northeastern) and Algonquin Gas Transmission Company (Algonquin) to provide natural gas service to the New England States.[1]

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[1] Related applications filed by Tennessee Gas Transmission Company, Transcontinental Gas Pipe Line Corporation Texas Eastern Transmission Corporation and United Gas Pipe Line Company, proposed suppliers of natural gas to

Upon Northeastern's petition for review, the court below set aside various Commission orders, including those dismissing in part, without prejudice, an application of Northeastern and granting a certificate of public convenience and necessity to Algonquin.

On August 24, 1949, Northeastern filed an application, amended on March 2, 1950, for a certificate to construct and operate a natural gas pipeline system to supply natural gas in Massachusetts, Rhode Island, New Hampshire and Connecticut to designated distributing companies and to "such communities as logically should be served by the pipeline system, and which are thus part of the potential market for that system" (R. 443a, 448a).

On January 24, 1950, Algonquin filed an application, amended on May 1, 1950, for a certificate to construct and operate a natural gas pipeline system to serve designated gas distributing utilities in New Jersey, Connecticut, Rhode Island and Massachusetts and "certain other customers who can be served economically by Applicant's pipeline system alone, all of which presently constitute the potential market for Applicant's proposed system" (R. 473a).

Northeastern and Algonquin, are described in the opinion below (R. 1572-1573). Since the issues involved depend upon disposition of the Northeastern and Algonquin applications, this petition, for purposes of simplicity, will discuss the case principally in terms of these applications, although the applications of their suppliers are also involved.

During the first half of 1950, hearings were held for thirty-six days on Northeastern's application in which Algonquin participated as an intervenor (R. 392a, 394a), and for seventeen days on Algonquin's application, in which Northeastern participated as an intervenor (R. 456a, 515a, 536a). The Commission then consolidated the Algonquin and Northeastern proceedings, and held 11 additional days of hearings, after which the record was closed except for proof of Algonquin's gas supply (R. 85, 169, 553a).[2]

Thereafter, on August 7, 1950, the Commission ordered its intermediate procedure omitted with respect to all matters involved in the consolidated proceedings except those relating to Algonquin's application for markets not sought by Northeastern (R. 81-83), and the presiding examiners certified to the Commission for decision the entire record in the consolidated proceedings (R. 619a, 624a). Northeastern affirmatively asserted that "both applicants have had a full hearing" with respect to the competitive aspects of their applications (R. 596a, 594a).

On October 4, 1950, in opinion No. 201, the Commission stated that "based on the market evidence

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[2] Algonquin was dependent for its gas supply on Texas Eastern which in turn depended on United. Algonquin's offer to prove its gas supply in the consolidated proceedings was denied by the presiding examiner on the ground that it should be presented first in the Texas Eastern proceeding. (R. 190-192, 615a-616a, 1262a-1265a, 1266a-1268a.)

presented on behalf of the entire New England area," "the public convenience and necessity requires adequate natural gas service" in that area (R. 86-87). It found, however, that the pending applications of Northeastern and Algonquin for permission to serve designated distributing companies without requesting "a certificate authorizing service to the entire area," resulted in "extensive and needless duplication and overlapping of facilities in the projects" so that granting either application would render the other project not feasible, and leave part of New England without natural gas service (R. 87).[3] Accordingly, the Commission found that neither application satisfied the statutory test of public convenience and necessity and suggested that "these applicants may present to the Commission without delay a proposal based upon evidence now of record which will meet the public demand and need for natural gas in New England in the early future" (R. 90). The Commission expressed the belief that "such a proposal can be submitted forthwith," but stated that it was "prepared to reopen the record for supplementary evidence if necessary" (R. 90).

Five days later, on October 9, 1950, Algonquin filed a supplement to its amended application, stating that it had been unable to obtain the cooperation of Northeastern to formulate a plan to meet

[3] The extensive duplication involved in the applications as filed is graphically shown by Exhibit No. 397 at R. 1383a.

the Commission's objections and proposing two alternatives to its pending application (R. 634a-635a). One called for a division of the whole New England market between Northeastern and Algonquin in accordance with a plan submitted in evidence by the Commission's staff, the other for authorization to Algonquin to serve the entire New England area based on evidence already in the record supporting this request (R. 636a-643a).

Northeastern, on the same day, submitted as its "Proposal" that the Commission grant its pending application and dismiss Algonquin's, "establish the six New England States as Northeastern's service area," and that "in a proceeding separate and removed from these proceedings" it would "undertake service for the entire area through its system" (R. 629a-630a).

One month later, on November 8, 1950, by its opinion No. 202 and accompanying order, the Commission authorized Northeastern to serve a part of the New England market, denied it authority to serve the remainder, and found "upon the basis of the record and findings herein, that the balance of the markets in New England as enumerated above, should be served by Algonquin upon a showing" of "an adequate supply of natural gas" (R. 111, 128, 129).[4] The Commission thus decided to

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[4] Correspondingly, Algonquin's application "insofar as it covers proposed service to communities and distributing companies herein authorized to be served by Northeastern

authorize two feasible projects for New England "with a minimum of duplication of facilities and a fair and equitable division of the market" (R. 107). To "secure to New England the benefits in part, at least, of an integrated natural gas system" it conditioned the issuance of certificates upon "the establishment of interconnections with, and agreements for emergency interchange of gas with, any natural gas system or systems serving the area at wholesale" (R. 111).

Northeastern accepted the certificate authorized in the order (R. 645a, 646a) and permitted the opinion and order to become final without seeking rehearing or review. After additional hearings, the Commission in its opinion and order No. 206 of February 27, 1951, found the existence of an adequate gas supply and granted Algonquin a certificate in accordance with its previous findings in No. 202 (R. 163, 178-179).[5]

On December 21, 1950, six weeks after the Commission's decision on dividing the New England market but before its issuance of a certificate of public convenience and necessity to Algonquin, Northeastern filed a new application for a certificate to extend its system "to all of the towns and

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Gas Transmission Company, be and the same is hereby denied" (R. 128-129).

[5] The Commission also granted certificates to United and Texas Eastern authorizing the sale and delivery of natural gas to Algonquin (R. 151, 176-178).

communities which Algonquin * * * has applied to this Commission for authority to serve and to a number of additional communities in Massachusetts, eastern New Hampshire and Maine to whom natural gas service has not heretofore been proposed" (R. 675a). With the exception of these "additional communities" the markets proposed to be served in Northeastern's new application "either were included in the certificate issued to Northeastern, * * * [were] denied [Northeastern] by the Commission's order issued November 8, 1950, * * * or * * * were reserved to Algonquin upon a showing by the latter * * * that it has an adequate gas supply therefor" (R. 64, 688a). Since, with minor exceptions, "all of the matters involved and issues presented" in Northeastern's new application "have been determined by the Commission's" prior decision, the new application was dismissed by order of January 10, 1951, as to all matters previously decided[6] "without prejudice to its refiling should the pending application of Algonquin be denied" (R. 65-66).[7] After the Com-

[6] The new aspects of Northeastern's application were ordered set for hearing at a date to be fixed by further order (R. 66).

[7] By orders of the same date, the Commission dismissed Northeastern's "supplement" in the Texas Eastern proceeding by which Northeastern sought to require Texas Eastern to sell natural gas required by Northeastern's new application and dismissed Tennessee and Northeastern from participation as intervenors in the further Algonquin proceedings relating only to gas supply (R. 80, 75-78).

mission's denial of petitions for rehearing (R. 185-209), Northeastern filed petitions to review the orders dismissing in part Northeastern's new application and granting a certificate to Algonquin (R. 1, 211).[8]

On review, the court below held that under Section 7(c) of the Natural Gas Act, Northeastern had a right to a hearing on its new application which had not been satisfied by the hearings already held because (1) neither Northeastern nor Algonquin at that time had presented a specific plan to service all of New England, (2) the allocation of markets which had not previously been sought by Northeastern was not properly before the Commission for decision because of the limited omission of its intermediate procedure, and (3) Northeastern's new application had been filed before a certificate had been granted to Algonquin. Accordingly, it set aside the Commission's orders dismissing Northeastern's new application and granting a certificate to Algonquin together with other related orders (R. 1571-1587).

REASONS FOR GRANTING THE WRIT

The holding of the court below that Northeastern was entitled to a hearing on its application to serve all of New England, although filed near the

[8] Other orders of which review was also sought will not be discussed separately since their disposition, for the most part, depends upon disposition of the basic issues presented by this petition.

conclusion of protracted and complex administrative hearings when all previously contested issues raised by long pending applications relating to the allocation of New England markets had been decided,[9] poses serious problems for administrative tribunals with respect to the fair and expeditious determination of applications for certificates of public convenience and necessity. The problem of natural gas service to the entire New England area had received extended and careful study by the Commission. But the court below, by a mechanical analysis of the pleadings and the Commission's orders, reached the conclusion that the precise question presented by the new application—service of all New England by a single company—had not been decided, that a certificate awarding markets sought by the new application had not yet been granted, and that the Commission never properly had before it the allocation of the markets previously sought only by Algonquin. It held, therefore, that a hearing on the new application was necessary as a matter of right before the Commission could proceed to a final determination of matters heard long before the new application had been filed. This holding represents both an unwarranted extension of *Ashbacker Radio Corp.* v.

[9] The adequacy of Algonquin's gas supply, the sole undecided issue in the consolidated proceedings, does not appear to have been contested. For this reason, the dismissal of the interventions of Northeastern and Tennessee is without significance.

F. C. C., 326 U. S. 327, and an undue restriction of *C. A. B.* v. *State Airlines*, 338 U. S. 572.

Under the reasoning of the court below, it would be possible for applicants, by reshaping the scope of their applications at any time before an order authorizing the issuance of a certificate of public convenience and necessity, to compel a succession of new hearings and thus indefinitely postpone administrative decision. The rigid mold into which the decision places administrative procedure impairs that flexibility, long regarded as the special virtue of the administrative process, which has made the use of specialized administrative tribunals particularly suited to dealing with the difficult and complex economic, social and technological problems of modern society.

The decision below not only imposes unjustifiable barriers to the exercise of sound discretion in the conduct of administrative proceedings, but also, by its stringent interpretation of statutory hearing requirements, may raise a question of the authority of agencies to prescribe rules for the orderly determination of applications for certificates or licenses where there may be competing interests.

1(a). Admittedly, Northeastern was entitled to a hearing on an application to provide natural gas service to New England, and the grant of a certificate to Algonquin without a hearing on Northeastern's application would be tantamount to the denial of such a hearing. *Ashbacker Radio Corp.*

v. *F. C. C., supra.* But the requirement of a new hearing on an application filed after extensive hearings on the same subject matter have been held, with the full participation of the applicant, goes far beyond the *Ashbacker* ruling—which held only that granting one of two mutually exclusive applications, without any hearings whatever, effectively deprived the other applicant of a hearing—and establishes conditions which can subject the administrative process in comparable situations to intolerable frustration and delay.

The extensive hearings which preceded both the denial of Northeastern's second application and the grant of a certificate to Algonquin satisfy the statutory requirement. The contrary holding of the court below is at odds with this Court's decision in *Civil Aeronautics Board* v. *State Airlines,* 338 U. S. 572, which makes clear that the substance, rather than the form, of the matter presented for administrative consideration is controlling. In that case, the Civil Aeronautics Board consolidated into one area proceeding and held hearings on some 45 route applications of 25 airlines. After making appropriate findings, it authorized certificates of convenience and necessity to Piedmont Aviation, Inc. to serve several new routes in the area for which it had not applied. State Airlines complained that it had been denied the hearing required by the Civil Aeronautics Act because Piedmont had never applied for the particular routes

certified. The Court upheld the Board's action, stating (338 U. S. 577-578)

> We are convinced that the Board, in awarding routes varying from those specifically detailed in Piedmont's application, has not departed from the congressional policy hinging certification generally on application procedures. While the routes sought by Piedmont did differ markedly from those awarded, they were all in the general area covered by the consolidated hearings. All twenty-five applicants had asked for routes somewhere in the area, and many of these routes overlapped. In such an area proceeding it would exalt imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes.[10]

The proceedings held in the present case clearly satisfy the standards established in the *State Airlines* case. At the conclusion of the separate and the consolidated hearings on the Northeastern and Algonquin applications, a voluminous record made upon a full hearing was before the Commission on rival applications to supply the New England area with natural gas.

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[10] The pertinent provisions of Section 401(d)(1) and (2) of the Civil Aeronautics Act, under construction in that case, are virtually identical with the pertinent provisions of Section 7(e) of the Natural Gas Act.

On the basis of this record, the Commission on October 4, 1950, found that the applications of Northeastern and Algonquin, as submitted, did not meet the test of "public convenience and necessity," and invited them to submit "without delay" and "forthwith" a plan "based on evidence now of record" to "meet the public demand and need for natural gas in New England." On October 9, 1950, Algonquin made alternative proposals in the pending proceeding relating to service of the entire New England area, but Northeastern proposed only that it would "immediately" submit a further plan "in a proceeding separate and removed from these proceedings" while requesting the Commission to allocate the entire New England area to Northeastern, grant its pending application, and dismiss Algonquin's.

At that time, therefore, the Commission had before it the two applications of Northeastern and Algonquin which in specific terms, in combination, requested all the markets involved in the portion of Northeastern's new application which the Commission refused to entertain. In addition, both Northeastern and Algonquin had requested in general terms the markets logically related to those specifically requested. It had the proposal of the Commission's staff for a division of these markets between Northeastern and Algonquin in a manner similar to, but not identical with, the division eventually adopted. It also had Northeastern's

further proposal to establish all of New England as its service area and Algonquin's supplemental proposal, in the alternative, that the New England market be divided between Northeastern and Algonquin as suggested by the Commission's staff, or that Algonquin be authorized to serve the entire New England area. Thus the Commission had presented to it not only the question of dividing the New England markets between the two applicants but also of allocating it entirely to Northeastern—the precise question posed by Northeastern's subsequent application—or to Algonquin.

When it divided the New England markets between the rival applicants in opinion and order No. 202, it did so on the basis of evidence in the record on "operating expenses, anticipated revenues, proposed rates, and all other matters relating to economic feasibility" of the systems proposed by the applicants after making the necessary adjustments for the two systems contemplated by the Commission's order (R. 108-111).[11]

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[11] The Commission had before it testimony and documentary evidence presented by its staff witnesses showing a division of the markets between Northeastern and Algonquin closely approximating the division adopted by the Commission in Opinion No. 202 and order of November 8, 1950. The markets assigned to each system by the Commission differed from those suggested by staff witnesses in only two respects. The staff pipeline system for Northeastern had only Tennessee as a source of supply, whereas the Commission expanded the Northeastern system by including Transcontinental as a second source of gas supply and assigned to

In accordance with its expressed intent in No. 201, the Commission was obviously determining the disposition of the entire New England market when it issued opinion and order No. 202. It found "that the Northeastern project as herein authorized can be justified and certificated on the present record," and "that the remaining markets in New England will provide an economic system for Algonquin which will be in the public interest." It, therefore, decided to grant to Northeastern a "portion of its application and authorize it to serve a part of the market and deny to it the remainder." It also concluded, "that the balance of the markets in New England as enumerated above, should be served by Algonquin upon a showing by Algonquin that it has an adequate supply of natural gas to serve such markets," and denied to Algonquin other markets for which it had applied (R. 111, 125-129).

Northeastern (1) various markets in Connecticut contiguous to the pipeline which provided the link between Northeastern's main system and the point at which Transcontinental would make delivery, and (2) Worcester Gas Light Company in Massachusetts, thus providing markets to utilize the full volume of natural gas to be received by Northeastern from its two gas suppliers. Correspondingly, the markets thus assigned to Northeastern by the Commission were taken away from the Algonquin system as designed by staff witnesses. No market assigned to Northeastern by staff witnesses was taken away by the Commission in opinion No. 202 and order. (R. 1282(31)a-1282(33)a, 1282(36)a-1282(37)a; Exs. 408, 409, 412, 413 at R. 1051a-1052a, 1059a-1062a.)

The markets denied to Northeastern and assigned to Algonquin are the same markets involved in the dismissed application (R. 64-65, 66, 728a). It is clear, therefore, that Northeastern had already had a hearing with respect to the subject matter of its second application. Surely, the statute does not entitle it to another hearing on this application because it presented the problem to the Commission in a different form.[12]

The effectiveness of the Commission's determination is not affected by the fact, stressed by the court below, that the Commission's order waiving its intermediate procedure did not apply to the markets designated in Algonquin's application

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[12] The dismissed portion of Northeastern's new application sought authority to serve 26 markets. 17 of these (Brockton Gas Light Co., Taunton Gas Light Co., Fall River Gas Works Co., Buzzard's Bay Gas Co., Norwood Gas Co., Blackstone Valley Gas & Electric Co., Narragansett Elec. Co. [Westerly & Bristol-Warren], Connecticut Power Co. [New London], Connecticut Light & Power Co. [Waterbury, New Haven, Willimantic, Putnam], New Haven Gas Light Co., Mystic Power Co., Hartford Gas Co., Norwich Gas & Elec. Dept.) were markets requested by Northeastern in its first application, which were specifically denied by the Commission's order in No. 202 (R. 129). The remaining 9 markets (Cambridge Gas Light Co., Dedham & Hyde Park Gas Co., New Bedford Gas & Edison Light Co., Plymouth Gas Light Co., Milford Gas Light Co., Boston Consolidated Gas Co., Old Colony Gas Co., Providence Gas Co., Newport Gas Light Co.) were requested in Algonquin's application and not previously sought by Northeastern. They formed a part of the system which the Commission in No. 202 found should be awarded to Algonquin (R. 109-111).

which Northeastern did not seek to serve. Whatever other effects this omission might have, it would hardly seem to buttress Northeastern's claim to a hearing on a new application.

Before the Commission issued its opinion and order No. 201, the presiding examiners had certified to the Commission the entire record in both proceedings (R. 619a, 624a). The Commission's actions thereafter were taken on the entire record (R. 85-86, 87, 89, 107). It is clear that the Commission intended by its order waiving the intermediate decision procedure to bring before it all competitive issues involved in the applications of the two companies (R. 83). That the Commission understood that it had done so and that these competitive issues required a resolution of the question of service to the entire New England market is clearly stated in its opinion No. 201 (R. 85-86).

Moreover, Northeastern had full opportunity through its intervention in the Algonquin proceeding and in the subsequent consolidated proceeding to make its case for serving these markets, which it apparently did not attempt to do. It may therefore be deemed to have waived any claim to serve them. Their subsequent award to Algonquin, therefore, furnishes no basis for complaint. Certainly, in these circumstances, Northeastern can assert no justifiable right to be heard on an application to serve them which was filed for the first time after the Commission had found that they

could best be served by Algonquin. Algonquin would seem to be the only party entitled to complain of the Commission's failure to waive the intermediate procedure with respect to these markets, since one of them, Worcester, was awarded to Northeastern.

In any event, if the Commission's findings in opinion and order No. 202 were for any reason improper, Northeastern's remedy was to have them overturned by following the exclusive statutory procedure and not by collateral attack. See *Federal Power Commission* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159. Northeastern, however, permitted that opinion and order to become final without filing an application for rehearing or seeking judicial review, under Section 19 of the Act, of the Commission action denying it requested markets. With the door thus closed to any attack on the certificate granted to it, Northeastern filed a new application for a certificate of public convenience and necessity to serve the very markets in New England which the Commission had just denied to Northeastern and had determined should be served by Algonquin upon a showing of an adequate gas supply.[13] A new application at this stage of the

[13] Additionally, the new application sought authority to serve seven distributing companies which had not been covered by opinion No. 202 and order (R. 64-65, 673a-686a). Service to these companies represented 6% of the market requirements of all the gas distributing companies involved in the application (R. 773a).

proceeding comes too late to stay the Commission's hand in passing upon prior applications for providing service to the New England area. Compare *Seaboard & Western Airlines* v. *Civil Aeronautics Board,* 181 F. 2d 777 (C.A.D.C.). The attempt to reopen the decision of the Commission in No. 202 with respect to the division of the New England market by this device amounts to a collateral attack on that decision without compliance with Section 19(a) and (b), making the filing of an application for rehearing within 30 days and a petition for review within 60 days absolute prerequisites to judicial review. *Louisville Gas & Electric Co.* v. *F. P. C.,* 129 F. 2d 126 (C.A. 6). Certainly to the extent that Northeastern was denied markets, it was a final and reviewable order. The Commission's designation of an economically feasible project for Algonquin was also ripe for review at this time since the markets denied to Northeastern comprised an integral part of this project and the denial of these markets to Northeastern was clearly reviewable.

The policy considerations underlying the statutory time limits were well summarized by the Commission (R. 203):

> Northeastern cannot accept the benefits of our Opinion No. 202 and accompanying order, fail to exercise its right to apply for rehearing or appeal as provided in the Natural Gas Act, accept in writing the privileges conferred

by the opinion and order, and then collaterally attack a portion thereof in this manner. If such action were permitted hearings might continue *ad infinitum* and regulation which was designed to protect the consuming public would fail of its purpose and become a time consuming but empty process.

(b). By its ruling that Northeastern was entitled to a hearing that it did not have, the court below may also raise a question as to the validity of agency regulations promulgated to provide an orderly procedure for hearings in cases where there may be competing applications for licenses or certificates of necessity. For example, with respect to applications for radio licenses, the Federal Communications Commission has required "an application that is mutually exclusive with another application or applications already designated for hearing" to be filed "at least 20 days before the date on which the hearing on the prior application or applications is scheduled" or be subject to dismissal and eligible for refiling only after withdrawal of or a decision on the prior application. 47 CFR § 1.387(b)(3).[14] If the statutory hearing requirement compels the administrative agency to afford a hearing at any time before final decision on a competitive application, as held below, a question occurs whether the

[14] See also a proposed rule of the Federal Power Commission, 17 Federal Register 4390, May 14, 1952.

agency possesses authority to modify this right by regulation. Certainly, administrative agencies should be permitted to provide an orderly procedure for hearing what may be extremely complicated questions where there is provision for notice and an adequate opportunity for hearing. There is nothing in the decisions of this Court which suggests that this opportunity must remain open until all proceedings are at an end.

2. The fact that the Commission by its opinion and order No. 202 had not decided the adequacy of Algonquin's gas supply and granted it a certificate did not qualify the character of the hearing with respect to determinations actually made. The requirement of the decision below that all questions be held open until all are finally decided unnecessarily encumbers administrative proceedings and is at variance with rulings of this Court. Determination of the order in which particular issues should be decided is a matter for administrative discretion. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 508-509. "A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made." *New England Divisions Case*, 261 U. S. 184, 201. This Court has recognized that administrative

agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143.

A final order entered at an interim stage of the proceedings has been upheld where, "while the proceedings were not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584. See also *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 525; *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 842 (C.A. D.C.); *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 591 (C. A. 2). Withholding the grant of Algonquin's certificate of public convenience and necessity until its gas supply had been established, therefore, did not enlarge Northeastern's procedural rights with respect to the question of the allocation of markets which had in fact been decided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General

BRADFORD ROSS,
General Counsel,
Federal Power Commission.

JULY, 1952

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83, 15 U.S.C. 717 *et seq.*, are as follows:

> SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.
>
> * * * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set

the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the

whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

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SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after

the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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